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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DONOVAN JAMES GOUGH, Defendant and Appellant.	D052338 (Super. Ct. No. SCN228139 & SCN233783)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed.

Donovan James Gough pled guilty to false imprisonment of his ex-wife and was placed on probation. He promptly violated the terms of his probation and later pled guilty to one count of stalking in violation of a restraining order. In this appeal, Gough challenges the sentence imposed for the two crimes. He contends the court denied him the right to allocution at sentencing, improperly denied probation and imposed

consecutive prison sentences, and that the court erred in imposing a 10-year restraining order. We will reject each contention and affirm the judgment in each case.

In case number SCN228139 Gough entered a guilty plea to false imprisonment of his ex-wife (Pen. Code,[1] § 237, subd. (a)). He was placed on probation for that offense on July 30, 2007 and ordered to have no contact with his ex-wife and their children. On August 9, 2007, the court revoked Gough's probation after he contacted his ex-wife in violation of a restraining order.

Gough thereafter pled guilty in case number SCN233783 to one count of stalking in violation of a restraining order. (§ 646.9, subd. (b).) The remaining counts were dismissed as part of a plea agreement.[2]

The trial court denied probation in case SCN233783 and sentenced Gough to the middle term of three years. In case number SCN 228139, the court declined to reinstate probation and imposed a consecutive eight-month term (one third the middle term). Finally, the court issued a restraining order pursuant to section 646.9, subdivision (k), preventing Gough from contacting his ex-wife for a period of 10 years.

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 Since Gough does not challenge the basis of his guilty pleas or the probation revocation, we find it unnecessary to set out a statement of facts. We will discuss the facts, to the extent they are relevant in the discussion part of this opinion.

DISCUSSION

I

THE TRIAL COURT DID NOT DENY GOUGH'S RIGHT TO ALLOCUTION

During the sentencing hearing Gough attempted to address the court on several occasions. In each instance the court indicated it did not wish to hear further comments from Gough. On appeal, Gough contends the trial court denied his statutory and due process rights to allocution as defined in sections 1200 and 1201.[3] After the filing of the opening brief, the California Supreme Court filed its opinion in *People v. Evans* (2008) 44 Cal.4th 590 (*Evans*). Thereafter Gough filed a supplemental opening brief in which he modified his arguments to rely on section 1204 and continued to claim a due process violation. We believe the court's opinion in *Evans* resolves this issue contrary to Gough's position. Accordingly we will reject this challenge to Gough's sentence.

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[3] Section 1200 provides: "When the defendant appears for judgment he must be informed by the Court, or by the Clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

Section 1201 provides: "He or she may show, for cause against the judgment: [¶] (a) That he or she is insane; and if, in the opinion of the court, there is reasonable ground for believing him or her insane, the question of insanity shall be tried as provided in Chapter 6 (commencing with Section 1367) of Title 10 of Part 2. If, upon the trial of that question, the jury finds that he or she is sane, judgment shall be pronounced, but if they find him or her insane, he or she shall be committed to the state hospital for the care and treatment of the insane, until he or she becomes sane; and when notice is given of that fact, as provided in Section 1372, he or she shall be brought before the court for judgment. [¶] (b) That he or she has good cause to offer, either in arrest of judgment or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial."

Allocution is an old concept, which generally refers to the court's duty to inquire whether there is any reason why judgment should not be pronounced. (*Evans, supra,* 44 Cal.4th at pp. 592-593.) The statutory allocution process in California does not provide an opportunity for the defendant to make a personal statement in mitigation of punishment. (*Id.* at pp. 597-598.)

In the present case, Gough appeared at sentencing and counsel advised the court there was no legal reason why judgment should not be pronounced. In short, the statutory process of allocution was satisfied. Although the trial court's refusal to allow Gough to make lengthy statements makes it difficult to fully discern the proposed content of his statements, nothing in the record or in the briefs on appeal indicates he wanted to express a legal cause that would prevent pronouncement of judgment. Rather, it seems he wished to offer some mitigating information in response to the prosecutor's arguments. Sections 1220 and 1201 do not provide for such statements by a represented defendant.

Section 1204 on the other hand, provides that circumstances in aggravation or mitigation of punishment "shall be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."

The court in *Evans* traced the right of allocution to the common law. The right existed in a time where a defendant could not be represented and could not testify at trial. Allocution was the opportunity for the defendant to seek mitigation of the harsh punishments of the time. The court looked to section 1204 for guidance and concluded a defendant wishing to make an oral statement in mitigation must do so through testimony under oath. (*Evans, supra*, 44 Cal.4th at p. 598.) The court also noted the defendant can submit a written statement to the probation officer for inclusion in the probation report. (Cal. Rules of Court,[4] rule 4.411.5(a)(4)), or by a written report filed by the defense. (*Evans, supra,* at p. 598.) A trial court has discretion to permit a defendant, with the parties consent, to proceed informally to make a statement to the court. (*Id.* at p. 599; see also *People v. Maese* (1980) 105 Cal.App.3d 710, 724.)

In the present case, Gough, who was represented by counsel, submitted a written statement to the probation officer and the statement was included in the probation report. Defense counsel submitted the sentencing arguments on the probation report, which recommended probation subject to local custody. Gough's father also addressed the court on Gough's behalf. Finally, the sentencing judge was the same person who placed Gough on probation following his first conviction and was fully informed of the circumstances surrounding the probation violation and the new offense. Prior to sentencing, the judge, with counsel, listened to recordings of the threatening phone calls to Gough's ex-wife. Thus, there is some merit to the trial court's observation that it did not need to hear

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4 All further rule references are to the California Rules of Court unless otherwise noted.

anything further from Gough, who had essentially denied his conduct was as serious as the trial court viewed it. Nothing in this record indicates Gough desired to offer testimony under oath about his views on mitigation. Thus we find no violation of Gough's statutory rights to personally inform the court of his views on punishment.

Gough contends that even if the court did not violate his statutory rights, his federally protected right to due process was violated when the court did not allow him to make an additional informal statement. Gough's position was specifically rejected by the court in *Evans, supra,* 44 Cal.4th at page 600. The opinion in *Evans* relied on *Mathews v. Eldridge* (1976) 424 U.S. 319, 333, where the court said: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Here, Gough was afforded a meaningful and timely right to inform the court of his views. His written statement was considered by the court. He was represented by counsel and nothing in this record demonstrates counsel was ineffective. Thus we believe Gough was accorded due process in this case and the trial court's refusal to allow further, unsworn statements did not undermine his ability to have his positions meaningfully considered.[5]

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[5] While we have determined the trial court did not deny Gough due process or violate the statute by cutting off his attempts to address the court, we wonder if a better course might have been to give him a brief opportunity to speak. This was an emotionally charged case, involving a person with no criminal history prior to the first offense. We do not question the trial court's concerns about the danger Gough presented by his inability to control his threatening behavior. We are also aware trial courts are often pressed for time. We cannot help but wonder in this case if it might have been a better use of judicial resources to allow the defendant one brief opportunity to speak, even if his plea would have been unsuccessful. At least it would have been made.

Gough contends the *Evans* decision is wrong and relies on a Ninth Circuit case, *Boardman v. Estelle* (9th Cir. 1992) 957 F.2d 1523. *In Boardman*, a divided, three judge panel determined the denial of an opportunity to speak at sentencing, although represented by counsel, amounted to a denial of due process. (*Id.* at p. 1525.) The court in *Boardman* recognized the U.S. Supreme Court has never held that denial of the opportunity to make an unsworn statement at sentencing was a violation of due process. (*Id.* at p. 1527.) Further, the *Boardman* majority did not consider California's sentencing scheme as analyzed by our Supreme Court in *Evans, supra*, 44 Cal.4th 590.

Further, it appears the federal courts are divided on the question of whether denial of allocution is a denial of due process. (*Milone v. Camp* (7th Cir. 1994) 22 F.3d 693, 704, fn. 10; *U.S. v. Tamayo* (11th Cir. 1996) 80 F.3d 1514, 1518-1519, fn. 5.)

We are, of course, obliged to follow the decisions of our Supreme Court and not those of the lower federal courts. Further, we think the *Evans* court has correctly analyzed the California system for allowing defendants to have their views considered at sentencing. Plainly, the *Evans* opinion is a reasonable application of federal constitutional principles. Applying the reasoning of *Evans, supra*, 44 Cal.4th 590, to this case we conclude Gough was not denied due process and that his views on sentencing were fully and meaningfully examined.

II

THE TRIAL COURT PROPERLY DENIED PROBATION AND IMPOSED CONSECUTIVE SENTENCES

Gough contends the trial court erred in denying his request for probation and in imposing consecutive midterm sentences. We find both issues waived for failure to raise them in the trial court. Even if we considered the merits of the contentions we would find no error.

The Attorney General argues that Gough has waived these issues because his counsel never raised any objections to the trial court's sentencing decisions. We agree. In *People v. Scott* (1994) 9 Cal.4th 331, 353, the court held that a defendant cannot raise a sentencing error for the first time on appeal. A person who wishes to challenge the trial court's sentencing choices and the reasons for those choices must first raise the specific objections in the trial court. Gough did not challenge either the court's sentencing choices or the reasons given by the court for its choices. Accordingly, he cannot now raise those objections on appeal.

In a brief argument raised for the first time in his reply brief, Gough contends that if the waiver rule is applied to his objections then trial counsel was ineffective. We find it unnecessary to address the merits of a claim raised in a cursory manner in the reply brief. Gough does not identify anything in the record to establish that trial counsel was deficient in the manner in which the sentencing hearing was conducted. If Gough has some information outside the record to support such claim it can be presented by a

petition for habeas corpus filed in the trial court. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264.)

Although we are satisfied Gough has waived these objections to his sentence, we will consider the merits of the claims. When we review the sentencing decisions of a trial court we do so under the deferential abuse of discretion standard. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) In order to establish an abuse of discretion an appellant must demonstrate that the trial court's decisions were arbitrary, capricious or exceeded the bounds of reason. (*People v. Edwards* (1976) 18 Cal.3d 796, 807; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

Guidance for trial courts in granting or denying probation is found in rule 4.414. While trial courts are to be guided by the rule, which sets forth factors in aggravation and mitigation, the trial court is not required to discuss each factor on the record. (*People v. Evans* (1983) 141 Cal.App.3d 1019, 1022.)

The probation officer recommended a grant of probation based principally on the officer's view that Gough had the ability to comply with probation. The officer noted, however, that given Gough's conduct and the fact he committed the new crime within days of his first grant of probation that he should have a substantial penal sanction. Accordingly, the recommendation for probation was conditioned on 365 days in local custody.

It is clear from the record that the trial judge disagreed with the view that Gough had the ability to comply with probation. The court said:

> "Your statements are threatening and I don't know what prompts your inability to stop but you have an inability to stop your behavior and because of that I have no choice but to send you to state prison. I don't want to do that. I didn't want to do that. I was certainly grappling with this situation, but I cannot put this family in any further peril. It is not fair to them. It is just not. They have the right to some peace of mind."

The trial judge listened to the recording of the threatening phone calls made by Gough while he was already on felony probation. The judge, who was very familiar with the facts and circumstances of these crimes, was clearly entitled to disagree with the probation officer's assessment of Gough's ability to comply with probation and about the degree of danger Gough presented to the victim in this case. There is nothing in this record to support a claim that the trial court abused its discretion in denying probation.

Similarly, the court acted within its discretion in imposing consecutive, midterm sentences. Consistent with rule 4.425(a) these crimes were independent of each other and were committed at different times or separate places. The trial court recognized the separate nature of the crimes and imposed the sentences on that basis. There is no indication of an impermissible dual use of facts here. Probation was denied because of the danger Gough presented due to his unrelenting, threatening behavior and his actual inability to comply with probation. Consecutive sentences were imposed based upon their separate occurrence. A single valid factor under rule 4.425(a) is sufficient to support the imposition of consecutive sentences. (*People v. Davis* (1995) 10 Cal.4th 463, 552.)

III

A 10-YEAR RESTRAINING ORDER WAS PROPERLY ISSUED

Gough contends the trial court abused its discretion in issuing a 10-year restraining order pursuant to section 646.9, subdivision (k), arguing the trial court failed to analyze the circumstances to determine the proper term of such order. Once again, we have a silent record on the issue Gough now seeks to raise on appeal.

After the sentence was imposed, the prosecutor asked the court to impose a 10-year restraining order. Gough made no objection to the issuance of or the term of the order. As a result, the court issued the order without lengthy discussion.

The issuance of an injunctive order is reviewed for abuse of discretion. (*Gonzales v. Munoz* (2007) 156 Cal.App.4th 413, 420.) The person challenging such an order bears the burden of establishing an abuse of discretion, which is not shown by a silent record. (*People v. Davis* (1996) 50 Cal.App.4th 168, 172-173.)

In the present case, the trial court was fully aware of the egregious nature of the threat Gough posed to his ex-wife and his children. It was also aware of the demonstrated difficulty Gough has in controlling his emotions and behavior. Thus, since we presume the court understood the law and properly exercised its discretion, when nothing to the contrary is shown in the record, we find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.